(7)

No. 93-1911

In the

Supreme Court of the United States

October Term, 1994

CINDA SANDIN, UNIT TEAM MANAGER,
HALAWA CORRECTIONAL FACILITY,
Petitioner,

v.

DEMONT R.D. CONNER, ET AL.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF NEW HAMPSHIRE, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a maximum security state prison inmate who is not subject to a loss of good time credit, nor to any necessary impact on parole, but who "may be" subjected to disciplinary segregation for violation of prison rules, has a "liberty interest" in avoiding disciplinary segregation solely because state prison disciplinary rules require a disciplinary committee to find "substantial evidence" of a rule infraction before deciding whether and to what extent to order the inmate segregated?

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INTEREST OF THE AMICI CURIAE

This brief in support of the Petitioner is submitted on behalf of New Hampshire and the 36 other signature States and Territories ("the Amici States") through their Attorneys General pursuant to Supreme Court Rule 37.5. The Amici States have an important interest in this case because they each operate correctional facilities which require systems of inmate control that employ segregated confinement techniques for both administrative and disciplinary purposes, and administer these facilities through the use of written standards and safeguards. States, and their employees, are commonly subjected to suit under 42 U.S.C. §1983 for routine correctional activities alleged to violate the due process rights of prison inmates.

The Court has recognized that the administration of prisons is a matter "of acute interest to the States." *Meachum v. Fano*, 427 U.S. 215, 229 (1976).

STATEMENT OF THE CASE

This case arises from a Hawaii State Prison inmate's 42 U.S.C. §1983 claim alleging that prison officials violated a liberty interest protected by the Fourteenth Amendment by subjecting him to disciplinary sanctions without due process of law.

The Respondent was charged on August 13, 1987 with disobeying administrative rules in connection with his alleged lack of cooperation in a routine strip search procedure required of inmates moving between certain parts of the prison facility. The disciplinary violations for which inmates may be charged, the possible disciplinary sanctions, and the procedures to be followed in disciplinary proceedings are set forth in Hawaii State Prison rules. Petition for Certiorari, at A41-A60. These rules prescribed a maximum

disciplinary sanction of 60 days segregated confinement, which may also be accompanied by the loss of privileges, for "highest misconduct" and a maximum of four hours disciplinary segregation for "low-moderate" misconduct. *Id.* The rules also require that notice and an opportunity to be heard be provided on all types of "serious" charges except when "institutional safety or the good government of the facility would be jeopardized." Pet. App. at A54. At least four hours of segregated confinement is a *possible* sanction for any "serious" charge, but in no instance will a misconduct conviction result in a loss of "good time" or necessarily delay an inmate's release or parole.[1]

The Respondent was charged with three disciplinary offenses, one of which was classified as "high" and two as "low-moderate" under the prison rules. Pet. App. at A65-A67. After notice and a hearing held on August 28, 1987, he was convicted of all three charges, and sanctioned by 30 days in segregated confinement. *Id.* The high misconduct conviction was later expunged under the discretionary internal review procedures established by §17-201-20 of the prison rules, and the sanctions finally imposed were limited to one four-hour period of segregated confinement for each of the two low-moderate misconduct charges, to be served consecutively. *Id.* The Respondent actually spent 30 days in segregated confinement, however, before the adjustment was made.

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[1]Under Hawaii law, inmates do not earn or receive "good time." Inmate behavior is one of several factors which may be considered by the parole authority, but no statute or regulation mandates a presumption or other connection between parole decisions and an inmate's disciplinary record. Haw. Rev. Stat. §353-68 and §353-69. An inmate with numerous disciplinary sanctions may be granted parole. An inmate with no discipline sanctions may be refused parole.

Despite the relatively modest nature of the Respondent's "loss," he commenced a federal court action alleging he had been deprived of a constitutionally protected due process right to call witnesses at the disciplinary hearing. Although the Respondent pleaded "not guilty" to the disciplinary charges, the record below reveals no material facts which were in dispute at the prison hearing.

The U.S. District Court granted summary judgment for the Petitioner and other State defendants. Pet. App. at A21-39. The Court of Appeals, in a decision reported as *Connor v. Sakai*, 15 F.3d 1463 (9th Cir. 1994), concluded that the portion of the state prison regulations which directed prison hearing officers to find the inmate guilty if he admitted guilt or if there was "substantial evidence" of guilt, created a liberty interest in "remaining free of disciplinary segregation" by substantially fettering official discretion within the meaning of *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), and remanded the case.

This certiorari proceeding followed.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision oversimplifies and distorts the governing case law on the liberty interests of convicted prisoners by concluding that Hawaii law created a liberty interest solely because prison regulations prescribed guidelines to prison hearing officers concerning the standard of proof applicable to inmate disciplinary hearings. No consideration was given to the fact that the prison regulations did not limit the discretion of prison officials to employ segregated confinement as an administrative or disciplinary measure. Moreover, the application of a particular standard of proof is a procedural, not a substantive right, and is

relevant only where a State has already provided the inmate with the more basic due process right to be heard.

A liberty interest analysis is used to determine whether due process attaches to some substantive right of an individual, and, if so, what process is due before the government may act to deprive the individual of that interest. To conclude that a State has created a substantive liberty interest in avoiding segregated confinement merely because the State has elected, as a matter of sound prison management, to provide inmates with certain procedural due process protections in all nontrivial disciplinary proceedings impermissibly puts the cart before the horse; such a result is logically and practically flawed. *See Hewitt v. Helms*, 459 U.S. 460, 471 (1985).

The instant case presents an appropriate opportunity for the Court to reexamine the validity of the State-created liberty interest doctrine insofar as it applies to matters encountered by prison inmates in the ordinary course of prison confinement. The present "specific substantive predicate/explicit mandatory language" standard, most recently applied in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), depends entirely upon the phrasing of State regulations and thereby creates arbitrary and artificial results. It should be replaced by a "real substance" or "inherent interest" standard in which State law is relevant only to the extent it creates a substantive right to actual release from confinement warranting protection as an inherent liberty interest under the Due Process Clause, such as a right to early release based on earned good time, or a right to parole based upon meeting specific eligibility standards. The proposed standard would have no effect upon the right of inmates to present *substantive* claims based upon

the Eighth Amendment or other provisions of the Constitution.

Nothing about Hawaii's prison rules or the action taken by the prison administration in the instant case implicates the duration of the inmate's sentence. Continued focus on the phrasing of State prison regulations promises to encourage the filing of federal court actions seeking routine appellate-type review of routine actions by State prison administrators, and to embroil federal trial courts in unresolved state law issues. *See, e.g.*, the debate between the majority and the two dissenting opinions in *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994) (*en banc*).

ARGUMENT

I. HAWAII'S STATE PRISON REGULATIONS CREATE NO LIBERTY INTEREST IN FREEDOM FROM SEGREGATED CONFINEMENT.

In three decisions issued in 1983 and 1989, the Court formulated the standard for determining whether regulations governing the administration of State prisons constitute a State-created liberty interest protected by the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment. *Hewitt v. Helms*, 459 U.S. 460 (1985)(administrative segregation); *Olim v. Wakinekona*, 461 U.S. 238 (1983)(administrative inter-state transfer); *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989)(denial of individual visitors). This standard, hereafter referred to as the "*Hewitt/Thompson*" test, recognizes a protected liberty interest only if a State has acted to limit the discretion of prison officials by establishing substantive requirements or predicates which are "particularized,"

"objective," and "defined," *Olim*, 461 U.S. at 249, and which are also "explicitly mandatory." *Thompson*, 490 U.S. at 463; *Hewitt*, 459 U.S. at 471-472.

The mandatory nature of the limitations prescribed by a rule is critical. Only prison regulations which create a reasonable expectation that they can be enforced against prison officials will support a liberty interest claim. *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 465. The entire concept of liberty interest is grounded upon a "legitimate claim of entitlement," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), to a substantive benefit or privilege which has a real and substantial nature. *Wolff v. McDonnell*, 418 U.S. 539, 557. Consequently, prison regulations which advance penological and other State interests by providing guidelines for various administrative functions within the prison system create no liberty interest in the inmates if official decisionmakers retain the discretion to take action or deny relief "for any constitutionally permissible reason or for no reason at all." *Olim v. Wakinekona*, 461 U.S. at 249.

A. The Respondent Had No Enforceable Right In Avoiding Segregated Confinement.

The Hawaii Division of Corrections rules at issue in this case, Haw. Admin. R. Title 17, Subchapter 2, are entitled "The Adjustment Process."[2] They meet neither

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[2]The Hawaii Adjustment Process rules contain: 1) a list of several inmate "rights and privileges," including the right to "nutritious meals" and "respectful treatment," §17-201-5(a); 2) a list of inmate responsibilities, including obedience to prison rules and treating other persons "respectfully," §17-201-5(b); 3) a list of prohibited acts constituting misconduct and a list of the "sanctions which may be imposed as

part of the two-part *Hewitt/Thompson* test. Of initial significance is the absence of provisions pertaining to segregated confinement from the specific inmate rights and privileges listed in §17-201-5(a). Nor do the rules taken as a whole contain any "specified substantive predicates" or "explicit mandatory directives" which limit the use of segregated confinement *per se* or otherwise compel the conclusion that inmates have been conferred an enforceable right to be free of segregated confinement.

In fact, Subchapter 2 reflects an intention to preserve the administration's discretion to impose whatever disciplinary sanctions may be appropriate on a case-by-case basis. Although the rules are sprinkled with "shalls and wills," "mays" and "shoulds" predominate, especially regarding the imposition of particular disciplinary sanctions for particular offenses. Section 17-201-12 states that serious punishment shall be administered through an unbiased "adjustment committee," and by employing the *procedures* described in §§17-201-13 through 20, but these procedures are frequently qualified and subject to discretionary override by prison officials. For example, §17-201-17(a) limits the right to appear at a disciplinary hearing whenever "institutional safety or the good government of the facility would be jeopardized," and §17-201-17(f) lists exceptions to the right to offer evidence, including relevancy, redundancy, and "any other justifiable reason."

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punishment" for the respective offenses, §§17-201-6, 7, 8, 9 and 10; 4) several sections pertaining to the investigation and disposition of misconduct allegations, including hearing and post hearing review procedures, §§17-201-12, 13, 14, 15, 16, 17, 18, and 20; and 5) a description of punishments to which inmates may be subjected, §17-201-19. Pet. App. at A41-A60.

Section 17-201-18 pertains to adjustment committee findings and was the sole source of the "specific substantive predicates" and "explicit mandatory directives" relied upon by the Ninth Circuit, but §17-201-18(b) merely provides:

> Upon completion of the hearing, the committee *may* take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of *guilt* shall be made where:
>
> (1) The inmate or ward admits the violation or pleads guilty.
>
> (2) The charge is supported by substantial evidence.

[Emphasis supplied.]

Read literally, this language indicates that the adjustment committee is not required to render a decision, but, if it does, it may consider post-hearing evidence with which the inmate has not been confronted. The only limitation on the committee's discretion contained in §17-201-18(b) is that the committee may not *acquit* if substantial evidence supports conviction.

The Ninth Circuit found an additional limitation by making the unwarranted negative inference that a finding of guilt is permitted *only* if supported by substantial evidence. There is no indication Hawaii state courts would interpret

§17-201-18(b) in this manner, *see Olim v. Wakinekona*, 461 U.S. at 249-250 n.10, and the improbability of such an expansive interpretation is underscored by the recognition that due process is satisfied in a prison setting involving protected liberty interests whenever "some" or "any" evidence supports the administration's decision. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). In any event, the plain language of §17-201-18 does not support the conclusion that an inmate cannot be placed in segregated confinement if substantial evidence or an admission does not support his guilt.

The Ninth Circuit's interpretation of §17-201-18(b) also conflicts with other portions of the Adjustment Process rules which reveal that prison officials are not limited to specified substantive predicates in making decisions to place, or retain, an inmate in segregated confinement for disciplinary or other reasons, and the administration has reserved to itself the discretion to apply disciplinary sanctions, including segregated confinement, whenever such action would be in the best interest of the institution.[3]

The Hawaii rules now at issue resemble the Hawaii rules reviewed in *Olim v. Wakinekona*, 461 U.S. at 241-242, and the South Dakota parole rules reviewed in *Dace v. Mickelson*, 816 F.2d 1277 (8th Cir. 1987), both of which required State officials to follow certain procedures and

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[3]These provisions include: §17-201-19(a)(2), which authorizes the imposition of disciplinary segregation for more than sixty days with the administrator's approval; §17-201-19(b), which authorizes the adjustment committee to refer cases to the program committee for further action; §17-201-20(b), which authorizes the administrator to "initiate review of any adjustment committee decision and ... modify any findings or decisions;" and §17-201-14, which authorizes prehearing segregation for "the security or good government of the facility" or "for any other good reasons."

weigh certain factors, but created no protected liberty interest because the ultimate substantive decisions were reserved to the discretion of the final decisionmaker.

> If a ... regulation only mandates that the state officials follow certain procedures or take into account certain factors, but specifically provides that the prisoner's release is nevertheless discretionary with the board, as evidenced by the use of discretionary language, then no protected liberty interest has been created.

Dace v. Mickelson, 816 F.2d at 1280, citing *Hewitt v. Helms*, 459 U.S. 460 (1983) and *Greenholtz v. Nebraska Inmates*, 442 U.S. 1 (1979).[4]

Sections 17-201-19, 20 and 14 of the Adjustment Process rules, respectively, preserve the ultimate decisionmaker's discretion to impose or remit disciplinary sanctions without providing a full adjustment committee hearing, without following the recommendations of the adjustment committee, or without regard to the presence of "substantial evidence." Under such circumstances, any restrictions which §17-201-18 may impose upon the initial recommendations of the adjustment committee are not relevant, *Olim v. Wakinekona*, 461 U.S. at 249-250, and the

[4]*See also Moody v. Daggett*, 429 U.S. 78, 88 n. 9 (1976), which held that federal inmates have no statutory or constitutional entitlement sufficient to invoke due process in prisoner classification or rehabilitative programs established under federal regulations because 18 U.S.C. 4081 confers upon prison officials full discretion to control these conditions of confinement.

Adjustment Process rules lack the explicitly mandatory substantive predicates necessary to create a liberty interest.[5]

B. The Ninth Circuit Improperly Extended The *Hewitt/Thompson* Analysis To Mere Procedural Rights.

Even if the absence of substantial evidence were a basis for avoiding prison disciplinary sanctions under Hawaii law,[6] it does not follow that the presence of this particular

[5]Imagining how any State prison regulations which lack a clear State law remedy for enforcement of alleged "specific substantive predicates," can be viewed as imposing an "explicitly mandatory" limitation on the "discretion of State prison administrators," is difficult. The *Hewitt/Thompson* standard at least implies that a State court remedy is necessary to establish the presence of any State-law liberty interest claimed by prison inmates, and the rules presently before the Court lack such a remedy.

[6]Although the Court declined to review the second and third issues stated in the Petition for Certiorari, the Ninth Circuit's conclusion that the Petitioner's discretionary decision to deny the Respondent's request to call witnesses was not entitled to qualified immunity appears erroneous on its face. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), protects a state employee from personal liability where the very procedural regulations which invest her with discretion to exclude witnesses at prison disciplinary hearings are subsequently construed by an appellate court to establish a liberty interest. Nothing in the record below establishes that Ms. Sandin was not following the prison guidelines in good faith or reasonably knew the Respondent was constitutionally entitled to call witnesses at the August 28, 1987 disciplinary hearing to a greater extent than was allowed by §17-201-16(f)(2) of the State Prison rules. *See Wolff v. McDonnell*, 418 U.S. at 566 (inmate's right to call witness may be limited if it would jeopardize institutional safety or correctional goals), and at 582 (the right to call witnesses is qualified and defers "to the discretion of prison officials to the extent that the right recognized . . . is practically unenforceable.") Marshall, J., dissenting). *See also Codd v. Velger*, 429 U.S. 624 (1977), where the Court stated, at 627: ". . . if the hearing mandated by the Due

limit on administrative discretion should automatically create a liberty interest which vests all prison disciplinary hearings with all of the due process rights prescribed by *Wolff v. McDonnell*, 418 U.S. at 558-557.

The "substantial evidence" requirement of Adjustment Process Rule §17-201-18(b)(2) is not a true "substantive predicate" or "substantive standard" within the meaning of the *Hewitt/Thompson* test. "Substantial evidence" merely describes a standard of proof. As such, it is a procedural, not a substantive, concept. *See Superintendent v. Hill*, 472 U.S. at 447, a case where the issue addressed was whether due process required the application of the "substantial evidence" or the "some evidence" standard of proof.

A standard of proof appears in Hawaii's Adjustment Process rules as an administrative tool to guide the conduct of the State employees who serve on adjustment committees, not to create a substantive right for inmates to avoid disciplinary segregation or even to have their disciplinary decisions reviewed on a substantial evidence basis. "It is error to attribute significance to the fact that the prison regulations require a particular kind of hearing before the Administrator can exercise his unfettered discretion," *Olim v. Wakinekona*, 461 U.S. at 250. In *Hewitt v. Helms*, 459 U.S. at 471, the Court also stated that the adoption of procedural guidelines, without more, suggests that a State has chosen to apply only the specified protections and not all the procedural rights which might be required by the Fourteenth Amendment. Stated more directly, "[p]romises

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Process Clause is to serve any useful purpose, there must be some factual dispute . . . which has some significant bearing on the [matter in controversy]." No assertion has been made that the Petitioner interfered with the application of the substantial evidence standard to determine the misconduct allegations against the Respondent.

of particular procedures do not create legitimate claims of entitlement." *Wallace v. Robinson*, 940 F.2d 243, 248 (7th Cir. 1991)(*en banc*), *cert. denied*, 112 S. Ct. 1563 (1992)(holding that prison disciplinary procedures established no liberty interest in inmate's job assignment).

All mandatory language in prison regulations does not create a liberty interest, and the Court has cautioned that courts should not "search regulations for any imperative that might be found," but confine themselves to "relevant mandatory language that expressly requires" the application of substantive predicates.[7] *Thompson*, 490 U.S. at 464, n. 4. The Ninth Circuit itself has previously recognized that guidelines for corrections officers do not create entitlements for inmates, *Baumann v. Arizona Department of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985), but the decision below strays from the path laid out in *Thompson* by artificially seeking out and relying upon a minimally relevant procedural mandate -- that the adjustment committee find inmates guilty if there is substantial evidence of their guilt.

The Hawaii Adjustment Process rules do not expressly require the application of substantive predicates for the reasons expressed by the decision in *Miller v. Henman*, 804 F.2d 421 (7th Cir. 1986), *reh'g denied* 815 F.2d 37 (1987), *cert. denied* 484 U.S. 844 (1987), a *"Bivens"* action[8]

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[7]The wisdom of focusing on substantive rights is supported, among other things, by the fact that procedural mandates are generally accompanied by authority for waiving irregularities which do not materially affect the result reached, even in situations where significant substantive rights are at risk. *See Brecht v. Abrahamson*, 113 S.Ct. 1710, 1717-1718 (1993); *Chapman v. California*, 386 U.S. 18, 22 (1967); 28 U.S.C. §2111; Fed. R. of Civ. Pro. 61; Fed. R. Crim. Pro. 52 (a).

[8]*Bivens v. Six Unnamed Agents*, 403 U.S. 388 (1971), provides a cause of action analogous to 42 U.S.C. §1983 against federal officials.

brought by a federal inmate placed in segregated confinement without a due process hearing. In that case, the court of appeals held that the relatively detailed federal regulations created no liberty interest, because the Attorney General had merely:

> . . . told his staff how he wants to exercise his discretion -- language that brings his subordinates' acts in line with his wishes but does not reduce his discretion to do otherwise. . . . Whether we call the pronouncements "internal personnel manuals" or "precatory" or something else, they remain statements of the way in which discretion is exercised but do not establish substantive rights. [Citations omitted.] And because the liberty and property of a prisoner are defined by the substantive rules of positive law, the absence of such rules is dispositive.
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> The documents guide the staff rather than the prisoners. . . . *A jailer who gives erratic and unreliable classifications may have to answer to the Attorney General, but he does not have to answer to Miller.*

Miller v. Henman, 804 F.2d at 424, 427. [Emphasis supplied.].

"A liberty interest is . . . a substantive interest of an individual; it cannot be the right to demand needless formality. Process is not an end in itself." *Olim v. Wakinekona*, 461 U.S. at 250. The Respondent, however, is claiming a liberty interest in avoiding segregated

confinement simply because it was imposed as a disciplinary sanction, and despite his routine exposure to segregated confinement for nondisciplinary reasons. The instant case thus illustrates the tendency to trivialization which results from grounding the existence of a substantive liberty interest on a State's grant of selected procedural rights. If the *Hewitt/Thompson* test can be satisfied by mandating the use of some procedural protections, no matter how minor, in conducting inmate disciplinary proceedings or other activities associated with the daily operation of a prison system, then procedural challenges to hundreds of routine actions by prison administrators will be converted into civil rights violations redressable in the federal courts under 42 U.S.C. §1983.

II. INMATE DISCIPLINE, AND OTHER CORRECTIONAL ACTIVITIES WHICH DO NOT DIRECTLY IMPACT UPON TIME SERVED SHOULD BE EXCLUDED FROM LIBERTY INTEREST PROTECTION.

Except for *Hewitt v. Helms*, no decision of the Court has recognized a protected liberty interest of prison inmates in a right or privilege which did not directly relate to the fundamental interest of release from confinement, or, in the case of *Vitek v. Jones*, 445 U.S. 480 (1980), confinement in an entirely different type of institution.[9] The Amici States

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[9] *See also Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *summarily aff'd*, 434 U.S. 1052 (1978), where the opinion of the three judge district court found a liberty interest in avoiding administrative segregation based upon California prison regulations pertaining to both administrative and disciplinary segregation, and included dicta, at 402, suggesting that any transfer "to the grossly more onerous conditions of

ask the Court to revisit *Hewitt v. Helms* and hold that the only liberty interest which survives conviction and enjoys protection under the Due Process Clause is the inmate's inherent interest in release from the prison environment. Under this test, State laws necessarily remain relevant, but only to the extent they create clear substantive inmate rights which directly affect actual release from confinement, because only release from confinement is sufficiently important to be categorized as an inherent right derived directly from the Due Process Clause.

Adoption of this bright line standard would eliminate a sizable number of 42 U.S.C. §1983 claims based upon due process violations associated with alleged liberty interests in ordinary conditions of prison confinement, and would refocus judicial inquiry upon first principles enunciated by the Constitution. It would also encourage uniform results, comity with State courts, and reform and experimentation in State prison systems.

Meachum v. Fano, 427 U.S. at 224, rejected an inmate's claim that "*any* change in the conditions of confinement having a substantial adverse impact on the prisoner is sufficient to invoke the [inherent] protections of the Due Process Clause." [Emphasis in original.] In *Kentucky Department of Corrections v. Thompson*, a group of Amici States requested the Court to establish a bright line test that excluded the daily operational decisions of State prisons which did not affect the duration or very nature of confinement from the scope of State-created liberty interests, regardless of the content of state prison regulations addressing such activities. The Court held that Kentucky

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maximum security" would be inherently protected by the Due Process Clause.

had created no liberty interest in receiving individual visitors, but stated that it was expressing no view on the Amici States' proposal, would leave its resolution "for another day." *Id.*, 490 U.S. at 461-462, n.3. The instant case affords the Court an appropriate opportunity to determine whether *any* change in an inmate's conditions of confinement which may be regulated by State prison rules is protected by the Due Process Clause.[10]

A. The *Hewitt/Thompson* Rule Has Proven Cumbersome and Unpredictable.

The statutes and regulations governing good time at issue in *Wolff v. McDonnell*, clearly conferred upon inmates specific substantive rights in the retention of earned good time, 418 U.S. at 545-553, and good time can have a direct effect on the date of the inmate's release from confinement. Early release was, the Court indicated, an underlying interest of "real substance" to which procedural due process should attach. *Id.*, at 557; *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)(conditional freedom on parole is a valuable and very different condition than confinement in prison which includes many core values of unqualified liberty).

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[10]The Court has also advised that the procedural standards articulated in *Wolff v. McDonnell*, are not "graven in stone," and might appropriately be revised "as the nature of the prison disciplinary process changes." 418 U.S. at 571-572. During the past twenty years, correctional institutions have changed notably, not only in size, *see* note 16, *infra*, but by implementing professional management efforts which have brought improved physical facilities, greatly increased access to law libraries and legal assistance, and the voluntary establishment of procedural protections for inmates.

Since *Wolff*, however, the Court's opinions in conditions of confinement cases have included language which encourages a far broader view of inmate liberty interests that turns entirely upon the phraseology employed in State prison regulations or inmate handbooks. The 1983 decision in *Olim v. Wakinekona* coined a phrase which shifted the focus from specific substantive rights granted to inmates to specific restrictions applicable to prison officials. The Court stated that prison regulations could constitute a State-created liberty interest if they "plac[ed] substantive limitations on official discretion," *id.*, 461 U.S. at 249, and in the contemporaneous case of *Hewitt v. Helms*, 459 U.S. at 470-471, the Court actually held that Pennsylvania prison regulations pertaining to the administrative segregation of inmates imposed sufficient substantive limitations upon official discretion to create a liberty interest."[11] Finally, the 1989 *Kentucky Department of Corrections v. Thompson* decision explained the State-created liberty interest theory as follows:

[11]The *Hewitt* decision refers to Pennsylvania "statutes and regulations," *e.g.*, 459 U.S. at 470, but only regulations are cited in the opinion. Extra scrutiny seems warranted when, as in the instant case, prison rules are alleged to be the sole source of a State-created liberty interest. State corrections departments, like other state and federal agencies, may adopt rules which create substantive rights or duties only if the particular benefits or obligations created are authorized by the agency's enabling statute. The enabling statute establishes the framework and the agency rules merely fill in the details. *See, e.g., Sullivan v. Zerbley*, 493 U.S. 521, 528 (1990) (rules which exceed an agency's statutory authority are invalid). *See also Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-429, 432-433 (1935) (agency rules must be subordinate to and found within a discernable framework of delegated legislative authority).

> The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not the result of this Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations. 490 U.S. at 461.

This rationale varies from the Court's *Greenholtz* opinion, 442 U.S. at 7, which quoted *Board of Regents v. Roth*, 408 U.S. at 570-571, for the proposition that the existence of a liberty interest was determined by looking "not to the 'weight,' but to the nature of the interest at stake." Moreover, by purporting to be subject matter or value neutral, the *Hewitt/Thompson* test reduces the grand concept of inherent human rights into an elaborate search for details of statutory construction in hopes of determining whether particular language in prison regulations can be better categorized as mandatory or permissive, or as substantive or procedural. The door has been opened to procedural due process claims based upon minor details of State prison operations whenever there is a plausible suggestion of mandate in the applicable State law.

Disregarding the real substance of an inmate's alleged post-conviction liberty interest also introduces an element of unpredictability into the law which encourages frivolous inmate suits and generates inconsistent lower court decisions concerning the constitutional significance of routine correctional activities which are engaged in by all State and federal prisons.

The depth of division in court of appeals decisions involving inmate discipline and conditions of confinement is illustrated by the irreconcilable approaches taken by the Second and the Seventh Circuits in evaluating the significance of written rules governing prison discipline rules. *Compare, e.g., Walker v. Bates*, 23 F.2d 652, 656 (2d Cir. 1994), *cert. pending sub nom Bates v. Walker*, No. 94-158, which cites ten years of Second Circuit precedent holding that possible restrictive confinement imposed as a disciplinary sanction impairs a liberty interest protected by State law, *with Wallace v. Robinson*, 940 F.2d at 247-249, which holds that as long as an inmate's job assignment (or other condition of confinement) may be changed or terminated for "any reason," he cannot complain if such a change is actually made because of a procedurally deficient disciplinary action.

The unpredictability of the current State-created interest test, even in decisions by the same circuit, is demonstrated by the divergent results reached in the Ninth Circuit's opinions in the instant case and its 1985 decision in *Bauman v. Arizona Department of Corrections*, 754 F.2d 841, and by the majority and minority opinions in the Eleventh Circuit's recent *en banc* decision holding, by a six to five vote, that the new Georgia parole statute does not create a protected liberty interest. *Sultenfuss v. Snow*, 35 F.3d 1494.[12] The majority in *Sultenfuss* recognized that the mandatory language in the Georgia statute merely dictated what criteria should be considered, not that the inmate is entitled to a particular result if those criteria are met. The

[12]Judge Carnes filed a separate dissent disagreeing with both the majority and the other dissenters for not certifying State law questions concerning the discretion available to Georgia parole officials under the new statute to the Georgia Supreme Court.

dissenting judges sound the very note of irony recognized by Chief Justice Rehnquist in *Hewitt*, 459 U.S. at 471, by asserting that Georgia would not have bothered to include criteria in its parole statute had it not intended to impose substantive predicates upon someone.[13]

Subjecting details of daily prison life to federal court review under 42 U.S.C. §1983 penalizes legitimate state efforts to achieve a manageable and rehabilitative prison environment, and erodes federalism by offering a federal court remedy to anyone who claims to have been deprived of a benefit conferred by State law. Moreover, because the "mandatory outcome" required by the *Hewitt/Thompson* test is defined by State law, often including case law, continued use of the *Hewitt/Thompson* State-created law test interjects a federal court presence in matters traditionally viewed as prerogatives of the States. *See* note, 13, *supra*. *Compare Olim v. Wakinekona*, 461 U.S. at 259, n. 10 (Marshall, J., dissenting) *with Id.*, at 250, n. 10 (majority opinion). Issues such as the availability of State administrative procedure act, tort claims act, certiorari or other remedies are best decided by State courts, as are interpretations of parole and good time statutes necessary to determine their mandatory nature and practical effect upon a particular inmate.[14]

[13]The more constitutionally sound response to the contention that guidelines directed to State officials are usually expected to be followed, is that, given the limited nature of post-conviction liberty interests, such "substantive limitations on official discretion" do not necessarily vest the *inmate* with enforceable rights. *Compare Miller v. Henman*, 804 F.2d at 427 *with Hewitt v. Helms*, 459 U.S. at 471-472.

[14]Good time programs do not necessarily create protected liberty interests in all situations, *see Superintendent v. Hill*, 472 U.S. at 453, and the distinguishing factors may involve considerations other than the presence of mandatory language in the statute and implementing

B. The State-Created Liberty Interest Standard May Be Appropriately Reevaluated In The Limited Context of Daily Prison Operations.

The opportunity to ease "the problems in judicial administration caused by the surfeit of meritless *in forma pauperis* complaints in the federal courts" recognized in *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), would alone justify the articulation of a bright line rule applicable to liberty interests in conditions of prison confinement,[15] but such a rule would also recognize the States' substantial interest in prison administration and in interpreting their own laws, as well as providing a clearer analytical basis for evaluating post-conviction liberty.

An inmate is confined to a prison system as a result of criminal conviction and sentencing procedures which require that procedural due process be carefully observed. Once duly imposed, however, a prison sentence necessarily involves a major reduction in the convicted person's constitutionally protected liberty interests. The decisions of

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regulations. For example, N.H. RSA 651-A:22, IV(c), provides for the discretionary return of good time by prison officials, and measured amounts of good time lost through disciplinary sanctions are routinely restored to inmates each month upon their continued good behavior and submission of a request to the warden or Commissioner of Corrections. Consequently, the loss of ten days good time early in a ten year minimum sentence would not affect the inmate's actual release date or eligibility for parole, and would be an entirely speculative basis for concluding that a liberty interest had been impaired.

[15]The respondent's claim that he was unreasonably deprived of the right to call witnesses is an example of such a case. Many 42 U.S.C. §1983 claims seek nothing more than routine sufficiency of the evidence review of disciplinary actions which have, in fact, resulted in the imposition of only minor or probationary disciplinary sanctions.

the Court have uniformly recognized this basic principle, *e.g.*, *Wolff v. McDonnell*, 418 U.S. at 557; *Bell v. Wolfish*, 441 U.S. 520, 546 (1979), and conditions of confinement which are "within the sentence imposed" upon an inmate "and not otherwise violative of the Constitution" are not entitled to *inherent* protection under the Due Process Clause. *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

The day-to-day activities of State and federal prisons systems include intrastate and interstate transfers, classifications, administrative and disciplinary segregation, discipline and grievance systems, mail privileges, visitor privileges, organizations, library privileges, education opportunities, vocational training, job assignments, work-release, commissary privileges, and hobby, recreation and leisure time activities. None of these activities are *inherent* liberty interests, and the Court has held that confinement to more restricted quarters is a far less significant change in a prisoner's freedoms than becoming eligible for parole retaining or good-time credits, which have also been held to create no inherent liberty interest. *Hewitt v. Helms*, 459 U.S. at 468.

Promulgation of written regulations governing the performance of daily prison operations, including guidelines for disciplinary action against inmates, is a widely employed technique for managing the nation's growing prison population, and is, "in the view of many experts in the field, a salutary development." *Hewitt v. Helms*, 459 U.S. at 471.[16] Written regulations serve a number of valid

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[16]Since that observation was made, State and federal prison populations have grown dramatically, raising from a combined total of 436,855 on December 31, 1983 to 1,012,851 on June 30, 1994. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, press release dated October 27, 1994, and "Prisoners in 1993," Washington,

penological needs, as well as broader State interests such as personnel management, risk management and purchasing objectives, which require that they be written in direct, mandatory language. Vague, highly complex, or contradictory, regulations would leave correctional officers without meaningful assistance in making the quick judgments so often required of them in the daily operation of State prisons. Yet, only imprecise rules allow a State to defend itself against federal court actions brought by inmates seeking due process review of prison disciplinary actions and other routine administrative actions affecting the day-to-day activities of prison life.[17]

There are persuasive reasons for applying a different liberty interest rule when evaluating regulations governing the administration of prison systems than when evaluating other areas of State law.

D.C. June 1994. Of the 919,143 present State prison inmates, slightly more than 50% are likely to be the subject of disciplinary actions during their current sentence, over 90% of those charged with disciplinary infractions will be found guilty, and segregated confinement will be the most frequent form of sanction imposed. *Id.*, and U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Prison Rule Violators," Washington, D.C., December 1989.

[17]The *Sultenfuss* decision reveals the tension which the *Hewitt/Thompson* test places on ordinary principles of statutory construction by discouraging clear, directive language. The States are faced with a drafting dilemma. Even a statute which expressly states that no liberty interest is being created, may be differently construed by the federal courts in deciding Due Process Clause claims. On the other hand, state courts may find a statute which provides that specific requirements imposed upon state officials are merely advisory is insufficiently clear to warrant enforcement against a state official charged with misfeasance.

> The deprivations imposed in the course of the daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good-time credits. Moreover, the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials, *see Meachum v. Fano*, 427 U.S. at 225. These facts suggest that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to "liberty," different from statutes and regulations in other areas.

Hewitt v. Helms, 459 U.S. at 470.

A bright line approach to liberty interests which eliminates the current form of the State-created interest test would also reduce the need for close federal interpretations of State law of the type described in *Olim v. Wakinekona*, 461 U.S. at 259 n.13 (Justice Marshall, dissenting), and the resulting intrusion upon State sovereignty. *See generally Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984); *Atascadero State Hospital and California Department of Mental Health. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985).

"The Fourteenth Amendment did not alter the basic relations between the States and the national government," *Screws v. United States*, 325 U.S. 91, 109 (1945), and infringement of State sovereignty was a factor influencing the Court's decision to apply a different standard of review for constitutional error claims brought in habeas corpus

proceedings than to claims presented on direct review. *Brecht v. Abrahamson*, 113 S. Ct. at 1721.

No apparent reason exists for subjecting the area of State prison operations to greater federal scrutiny than other State actions which might result in unfairness or discomfort to individual citizens. The Court has stated that it "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states," and will not do so unless the State's action 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

Moving the inquiry towards t he nature of the inmate's substantive right and away from the structure of the State's implementing regulations, would be fully consistent with the Court's prior observations that: 1) running a prison is a uniquely difficult job which warrants deference to the judgment of prison officials. *E.g., Hewitt v. Helms*, 459 U.S. at 467; *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); 2) courts are "ill-equipped to deal with the increasingly urgent problems of prison administration and reform," *Procunier v. Martinez*, 416 U.S. 396, 405 (1974); and 3) "limitations on the exercise of [an inmate's] constitutional rights arise both from the fact of incarceration and from valid penological objectives -- including deterrence of crime, rehabilitation of prisoners and institutional security." *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987).

State efforts to regulate conditions of confinement should not create a liberty interest for prison inmates, even if the withdrawal or limitation of similar State-created rights or privileges might be sufficient to create such an interest in a different setting. In *Paul v. Davis*, 424 U.S. 693, 710-711 (1976), the Court recognized that a variety of liberty and

property interests have attained constitutional status because they have been initially recognized and protected by State law. Because the traditional common law origins of most of these property and liberty interests are absent in the unique setting of post-conviction prison confinement, the revised standard proposed by the Amici States for applying due process protections to changes in conditions of inmate confinement would have no necessary effect upon the recognition of liberty interests in rights and privileges held by other citizens.

C. The Revised Liberty Interest Standard Proposed By The Amici States Would Not Materially Alter Existing Inmate Rights.

Under the "real substance" or "inherent interest" test proposed by the Amici States, a State law entitlement to release or potential release from the prison environment, whether through good time or parole, or to continued conditional freedom in the form of parole as in *Morrissey v. Brewster*, 408 U.S. 471 (1971), would remain protected. There is an intrinsic difference, however, between the inmate interest in sentence duration or early release protected in the State law cases of *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987), with its potential for complete release from the prison environment, and the interest in avoiding changes within that environment.[18] This distinction was recognized in *Hewitt v.*

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[18] *Baxter v. Palmigiano*, 425 U.S. 308 (1976), resolved issues pertaining to the due process protections required in prison disciplinary actions. The recited facts do not reveal whether the *Baxter* inmates were subject to disciplinary sanctions other than segregated confinement, but the

Helms itself, despite the fact that a State-created liberty interest was found to be present. 459 U.S. at 468.

The revised standard proposed by the Amici States would preserve the results reached in the good time and parole line of cases. What would be altered is the concept that a State regulation or statute pertaining to prison discipline, or to any other aspect of daily prison operation, which might reasonably be perceived as a "loss" to an inmate, but which actually affects only conditions of confinement within the scope of the inmate's sentence, could create a protected liberty interest. Under the proposed standard, inmates such as the Respondent would no longer have a colorable claim of due process violation based on changes in conditions of confinement and the wording of State regulations. In most instances, however, including the instant case, State prisons routinely provide brief hearings and other due process protections to disciplinary actions based on prison rule infractions, and to various nondisciplinary changes in conditions of confinement as well.

Moreover, the degree of due process protection which is warranted by changes in conditions of confinement may be minimal. This was, in fact, the case in *Hewitt v. Helms*, where the Court held that the administratively segregated

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Court stated that the decision was limited to allegations of "serious misconduct" like those at issue in *Wolff v. McDonnell*, where loss of good time was at stake, and did not extend to all actions in which inmates might be deprived of privileges. 425 U.S. at 323-324. The lower court in *Wright* interpreted the holding in *Baxter* somewhat differently, however, stating that it dealt with the "[deprivation] of significant privileges *or* [confinement] in maximum security for disciplinary reasons." 462 F. Supp. at 403. [Emphasis supplied.] The summary affirmance of *Wright* remains the only instance in which the Court has held that an inmate had a liberty interest in the subject matter of a prison disciplinary action not involving a loss of good time.

inmates in Pennsylvania satisfied due process." 459 U.S. at 477. Consequently, the primary effect of the proposed "real substance" test would be to eliminate the opportunity for inmates to seek federal court review of administrative actions taken by State prisons on routine due process grounds such as the sufficiency of the evidence or, as in the instant case, the reasonableness of the refusal of live witnesses.

Loss of this opportunity would by no means leave prison inmates without meaningful constitutional rights or adequate redress for injuries of real substance. Their rights to assert substantive, as opposed to due process, 42 U.S.C. §1983 claims based upon alleged violations of the First and Eighth Amendments and the Equal Protection Clause, would be unaffected, as would their right to pursue state law remedies. In addition to internal review procedures, such as those provided by §17-201-20 of the Hawaii "Adjustment Process" regulations, state remedies may include statutory or common law judicial review, such as the certiorari review provided in Massachusetts, *see Superintendent v. Hill*, 472 U.S. at 450-452, the habeas corpus review provided in New Hampshire, *see Baker v. Cunningham*, 128 N.H. 374, 513 A.2d 956 (N.H. 1986)(Souter, J.), and the appellate review conducted under New Jersey Court Rule No. 2:2-3(a)(2) authorizing review of final agency actions. *See Cinque v. Department of Corrections*, 261 N.J. Sup. 242, 618 A.2d 868 (App. Div. 1994).

Provided that they are not otherwise violative of the Constitution, or do not directly affect the duration of the sentence served, an inmate's interest in the conditions of his

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[19]For this reason, adoption of the proposed "real substance" standard would not,technically speaking, overrule the decision reached in *Hewitt*.

or her confinement are unremarkable. Unremarkable State-created rights can, and should, be left to ordinary State remedies.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed, and a revised standard for determining the liberty interests of prison inmates in the conditions of their confinement should be articulated.

Respectfully submitted,

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